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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

AUSTEN ROBERT MANUEL NUNES et al.,

Defendants and Appellants.

C060871

(Super. Ct. Nos.
072135/054185)

OPINION ON REMAND

INTRODUCTION

In April 2007, defendants Austen Nunes, Pauliton Nunes, and Daniel Bonge¹ went with several others to the train tracks in West Sacramento to drink some stolen beer. When an Amtrak train came by, slowing as it approached Sacramento, one of the group stood on the tracks, and Austen threw a rock at the train. The train stopped and the angry engineer got off the train. A vicious assault on the engineer followed.

¹ Because they have the same last name, we refer to Austen and Pauliton Nunes by their first names. We will refer to all three defendants collectively as defendants.

Defendants (and two others not before us) were prosecuted for multiple felonies, including attempted murder and assault with a deadly weapon on a public transit employee with great bodily injury and criminal street gang enhancements. The jury found defendants guilty of most of the charges and found most of the great bodily injury enhancement allegations true, but found the gang enhancement allegations were not true. The jury did, however, find defendants guilty of the offense of criminal street gang activity (sometimes called street terrorism).

On appeal, defendants contend: (1) it was error to qualify Police Officer Kenneth Fellows as a gang expert; (2) Officer Fellows's testimony improperly invaded the province of the jury; (3) there was insufficient evidence to support their convictions of criminal street gang activity; and (4) in any event the trial court should have stayed the sentence for criminal street gang activity pursuant to Penal Code² section 654. Austen and Pauliton further contend the trial court erred in failing to instruct the jury that the testimony of Bonge's girlfriend, C. S., had to be corroborated because she was an accomplice. In addition, Austen contends there was insufficient evidence he personally inflicted great bodily injury. The People concede defendants' three remaining contentions: (1) their convictions for assault with a deadly weapon (counts 2 through 4) should be reversed because those offenses are lesser included offenses of

² Further unspecified section references are to the Penal Code.

assault with a deadly weapon on a public transit employee, of which defendants were also convicted (counts 5 through 7); (2) the great bodily injury enhancements to their convictions for battery with serious bodily injury (count 8) must be stricken; and (3) the amount of their court security fees must be corrected.

We agree with those of defendants' claims the People have conceded and reverse defendants' convictions for assault with a deadly weapon (counts 2, 3, and 4) and the great bodily injury enhancements on their battery convictions (count 8). Pursuant to the Supreme Court's recent opinion in *People v. Mesa* (2012) 54 Cal.4th 191 we also stay the sentence for criminal street gang activity pursuant to section 654. Finally, we correct the amount of the court security fees. Otherwise, however, we affirm the judgment. As we will explain, the gang expert was properly qualified and his testimony did not exceed the permissible scope for a gang expert. There was substantial evidence of criminal street gang activity, and there was no evidence C. S. was an accomplice. Moreover, her testimony provided substantial evidence that Austen personally inflicted great bodily injury.

FACTUAL AND PROCEDURAL BACKGROUND

A

The Crimes

On April 16, 2007, several people, including defendants, was hanging out and drinking at the Pickwick Motel in West Sacramento. Among the group was Bonge's girlfriend, C. S., and

her brother Ernie, a self-proclaimed Broderick Boys gang member. The group took multiple photographs at the motel that were later found on Pauliton's cell phone, which was discovered at the scene of the attack on the train engineer. The photographs showed defendants and some others making gang signs outside the motel. In particular, they were forming the letter "N" and the number "14" or "XIV," which symbolize the Norteño gang (N being the 14th letter of the alphabet), and the letter "B," which symbolizes the Broderick Boys, a subset of the Norteño gang in West Sacramento.

After spending a while at the motel, a smaller group that included C. S. and defendants went swimming in the Sacramento River. After that, Austen suggested a beer run, and the group stole beer from a market. The group then went to the train tracks to drink the stolen beer.

At some point, after one of the group (Javier Ramos) went up on the tracks, an Amtrak passenger train approached on its way to Sacramento. The crew had received information that there were trespassers on the tracks, and as the train slowly approached the I Street Bridge the engineer, Jacob Keating, saw a person on the tracks waving his hands. As Keating stopped the train to avoid hitting the person (Ramos), Austen threw a rock at the train. Keating flinched and cursed as the rock struck the window frame near his head.

Angry, Keating got off the train and yelled at the group to get off the tracks. The group started throwing rocks at him and he threw a rock back. Keating then saw Bonge approaching him

with a big rock in his hand. Keating asked Bonge if Bonge was going to hit him, but then, in self-defense, Keating punched Bonge first. After Keating hit Bonge a second time, Bonge fell to the ground and pulled Keating with him, where Keating continued to punch Bonge. Pauliton intervened, kicking Keating in the ribs. Keating then began fighting with Pauliton, and a third person came up and hit Keating in the face a couple of times.

Meanwhile, the train's conductor, William Ray, Jr., had followed Keating off the train, grabbing a fire extinguisher before he stepped off because he heard yelling. After the group began throwing rocks at him, Ray discharged the fire extinguisher, then threw rocks back at them. At some point he set the fire extinguisher down and was rushed by several individuals. Eventually Ray managed to get back on the train amidst a barrage of rocks and bottles.

Richard D'Alessandro was a student engineer on the train. He also got off of the train and found it hard to see; things happened fast and it was "almost like a dream." Rocks and bottles were being thrown. D'Alessandro was not hit, but he reeked of beer. He returned to the train and called dispatch, requesting police assistance. A service attendant on the train had also called 911.

In the midst of the attack, Keating managed to get back on the train. When he saw that D'Alessandro was still outside and "in a bad situation," he got back off the train. He eventually ran into "the trespassers on the tracks" and ended up fighting

with five of them. Someone tackled him from behind, and then he was struck in the back of the head with a Grey Goose vodka bottle.³ Austen also struck Keating in the back of the head with the fire extinguisher. Keating begged his attackers not to kill him, but they continued attacking him. Eventually Keating was bleeding so profusely that everyone ran.

As Keating tried to get back on the train, Austen and another person returned and punched him, and Austen demanded his wallet and cell phone. When Keating told them, "'It is on the train,'" they hit him again, but then ran away when they determined the police were coming.

When Keating finally made it back onto the train, D'Alessandro drove the train into Sacramento. There was blood, broken glass, stones, and fire extinguisher dust everywhere. D'Alessandro described the scene as "pretty horrific."

Keating suffered serious injuries from the assault. He spent two and one-half days in the hospital and required staples to close the cuts on his head. In addition, he had numerous cuts and bruises and had to use a cane for two or three months. About a week after the attack, Keating returned to the hospital with severe postconcussive symptoms.

³ Austen had stolen the vodka earlier.

B

The Charges

The indictment charged defendants and two others (including Ramos) with 12 felonies and two misdemeanors: specifically, one count of attempted murder (count 1); three counts of assault with a deadly weapon (the fire extinguisher, the vodka bottle, and the stones) (counts 2, 3, and 4); three counts of assault with a deadly weapon on a public transit employee (the fire extinguisher, the vodka bottle, and the stones) (counts 5, 6, and 7); one count of battery with serious bodily injury (count 8); one count of attempted second degree robbery (count 9); one count of throwing a missile at a vehicle of a common carrier (count 10); one count of vandalism (count 11); one count of criminal street gang activity (count 12); and two misdemeanor counts of assault on transportation personnel (counts 13 and 14). All of the felony charges included great bodily injury enhancement allegations, and all of the felony charges except the criminal street gang activity charge (§ 186.22, subd. (a)) included enhancement allegations for criminal street gang activity under section 186.22, subdivision (b).

C

The Gang Expert

Before trial, Bonge moved to limit the testimony of any gang expert the People intended to call. The trial court denied that motion. Subsequently, during trial, Austen and Pauliton moved to exclude any gang expert testimony on the ground there

was insufficient evidence the crimes were gang related. Bonge joined that motion.

The court held a hearing on the motion to exclude gang expert testimony. Pauliton's attorney complained about late discovery and the late notice that Officer Kenneth Fellows would be substituted as the People's gang expert in place of the officer who had testified before the grand jury. The trial court ruled the defense could impeach Officer Fellows with the grand jury testimony of the other officer and limited Officer Fellows to giving opinions based on the reports defendants currently had. The court also limited Officer Fellows to the theory of gang involvement advanced before the grand jury.

Subsequently, Officer Fellows testified he had been a West Sacramento police officer for approximately nine years. He was currently assigned to the community response team, which dealt with gang, narcotic, and prostitution crimes and other quality of life issues. Before this assignment, he had been on patrol for approximately seven years.

Officer Fellows had 250 hours of formal training on gangs. His last training was a 16-hour FBI course a week before he testified. In addition to formal training, he had received training from field training officers and the gang investigator who had testified before the grand jury. Of his 250 hours of formal training, approximately 100 hours were devoted to Hispanic gangs, including the Norteños.

Officer Fellows had attended a debriefing of a lieutenant of the Nuestra Familia, a prison gang. The Norteño gang is a

division of the Nuestra Familia, and the Broderick Boys is a division (or subset) of the Norteños. Officer Fellows was a member of the California Gang Task Force, the Northern California Gang Investigators Association, and the California Gang Investigators Association. He had experienced no fewer than 700 gang contacts, mostly with Norteños, including the Broderick Boys, while working with gang members in West Sacramento. In his conversations with gang members, they had discussed the lifestyle, philosophy, membership, dress, hairstyles, signs and tattoos, graffiti, rivalries and alliances, and turf of the gang. They also discussed the gang concept of respect.

Officer Fellows had investigated no fewer than 20 gang crimes and had assisted in other investigations. He reviewed reports of gang-related crimes and consulted the database of gang-related crime members and suspects. He also read literature on gangs. Other officers asked him questions about gangs. Officer Fellows had previously been qualified as a gang expert in three preliminary hearings.

Defendants objected to Officer Fellows testifying as a gang expert, but the trial court overruled their objections.

Officer Fellows testified there are over 300 validated gang members in West Sacramento; 167 of them are members of the Broderick Boys. The Broderick Boys identify with the number 14 and the color red. They also identify themselves with the letter B.

There are several ways to become a member of the Broderick Boys. One can be "jumped in" through a fight. Another method is generational, by which members are accepted into the gang because there are already gang members in their family. Others join as walk-ins by hanging around gang members. Although Norteños are primarily Hispanic, in West Sacramento, whites and blacks are also accepted as members of the Broderick Boys.

Officer Fellows explained that gang members are expected to put in work or "earn [their] bones" to show they are "down for the gang." They do this by committing crimes or backing up fellow gang members who are confronted by rivals. They then earn loyalty or status within the gang and earn the right to a gang tattoo, such as four dots.

Turf is very important and the gang protects it. The turf of the Broderick Boys is north of Highway 50 to the Sacramento River and east of Harbor Boulevard, within the old neighborhoods of Broderick and Bryte. The railroad tracks where the attack on the engineer occurred were within the turf claimed by the Broderick Boys. There was a substantial amount of Broderick Boys graffiti in the area.

Officer Fellows testified that the primary activities of the Broderick Boys are assaults, theft, vehicle theft, burglary, narcotics sales, weapons violations, and homicides. The assaults often involve weapons and are violent, with multiple members attacking a single victim. Officer Fellows identified different levels of participation in a gang: "hanging around associates," who do not commit crimes; active gang members, who

commit crimes and recruit; and old gangsters or "OG's," who are older and out of prison. "OG's" are less likely to be actively involved; they use younger members to commit crimes.

Officer Fellows gave his opinion that Bonge was an active participant in the Broderick Boys. He based his opinion in part on the various photographs showing Bonge and others making the signs "N," "XIV," and "14." Officer Fellows noted the pictures had been taken in public and there would be adverse consequences for displaying gang signs if one was not a member.

Officer Fellows also based his opinion on evidence that Bonge had a prior police contact in which he was issued a STEP Act⁴ notice for hanging out with gang members. Specifically, Bonge was caught shoplifting at a Walgreens drug store in 2006 with Pauliton and Rolando Venegas, a validated Norteño and Broderick Boy.

Officer Fellows also relied on the theft of the beer on the day of the attack on the train engineer to support his opinion that Bonge was an active participant in the Broderick Boys gang. Fellows noted that Bonge associated with others to conspire to steal the beer and to engage in the gang activity of drinking beer and celebrating.

Officer Fellows also gave his opinion that Austen was an active participant in the Broderick Boys. He based his opinion in part on the fact that items seized from the Nunes residence

⁴ The STEP Act is the Street Terrorism Enforcement and Prevention Act (§ 186.20 et seq.).

-- which included a piece of notebook paper with "SAC," "916," "Norte," and "409" on it; two red bandanas; and a shirt with the character from the movie *Scarface* on it -- showed gang affiliation. *Scarface* is a violent movie about a gangster that glamorized the mentality that gang members idolize. The red clothing showed the residents were "gang related for the Norteños."

Also, when Austen was admitted to juvenile hall in 2005, he asked if it was filled with "scraps," a derogatory term Norteño gang members use for members of the rival Sureño gang. According to Officer Fellows, this showed Austen was a Norteño. Fellows also relied on another incident in 2006, in which Austen was documented wearing a red belt, and on the fact that Austen was shown making gang signs in the photographs taken on the day of the incident.

For similar reasons, Officer Fellows gave his opinion that Pauliton was an active member of the Broderick Boys.

It was also Officer Fellows's opinion that Ramos and the fifth charged defendant (R. R.) were active gang participants. Ramos had admitted he was a Norteño, claiming he was "jumped in" but had not yet put in the work to get his dots. Like Austen, Ramos used a derogatory term for Sureños ("sewer rats") while in juvenile hall. For his part, R. R. displayed his alignment with the Norteños by putting four dots and the number 14 on his sandals while in juvenile hall.

Officer Fellows explained the concept of respect as it pertains to gang members. A gang member can earn respect

quickly by an act of violence since respect is associated with fear in a gang. The more violence a gang commits, the more it cripples the community and makes citizens less likely to stand up and report gang crimes. Fear and intimidation are a gang's ultimate power over the community. Even if gang members do not shout out the name of their gang during an attack, in a small community word of gang violence spreads fast.

Officer Fellows also testified about three members of the Broderick Boys who had been convicted of gang-related crimes.

On cross-examination, Officer Fellows admitted it was not a crime to belong to a gang. Also, he testified the Broderick Boys were disorganized, with no "shot caller."

In response to a direct question by defense counsel, Officer Fellows testified it was his opinion that the assault on the railroad tracks was a gang crime because numerous gang members were associating and came to the aid of their friend who was being beaten in the fight and "turned the tables."

"Multiple subjects, that's gang mentality, that's a gang attack, it is a gang assault." The assault was a gang crime because of the association of the gang members, their prior documentation as gang members, their prior contacts with law enforcement, and the photographs showing them acting like gang members by throwing gang signs. Defendants did not just pull a friend away from a fight; they used numerical supremacy to turn the tables.

In response to defense counsel claiming Officer Fellows did not know the whole picture because he had not reviewed all the reports of the incident, Fellows responded he knew that the

engineer was assaulted, that defendants are gang members, that the assault benefited the gang, and that defendants acted in association for the benefit of the gang.

D

Verdict And Judgment

The jury acquitted Bonge of attempted murder, attempted voluntary manslaughter (a lesser included offense of attempted murder), and attempted robbery, but found him guilty of the remaining charges. The jury acquitted Austen of attempted murder but found him guilty of attempted voluntary manslaughter and all of the remaining charges. The jury acquitted Pauliton of attempted murder and attempted robbery but found him guilty of attempted voluntary manslaughter and all of the remaining charges.

As for the sentencing enhancement allegations, the jury found all of the criminal street gang enhancement allegations not true but found the great bodily injury enhancement allegations true as to the charges of the assault with the fire extinguisher (counts 2 and 5), the battery charge (count 8), and the criminal street gang activity charge (count 12).⁵

For each defendant, the trial court designated the assault with a deadly weapon on a public transit employee using the fire extinguisher (count 5) as the principal term and imposed a

⁵ The parties stipulated the jury should disregard the great bodily injury enhancement allegation on the charge of throwing a missile at a vehicle of a common carrier (count 10).

seven-year prison sentence for the conviction and the associated great bodily injury enhancement. Additionally, the court imposed a consecutive eight-month term on each defendant for the vandalism conviction and a consecutive eight-month term on each defendant for the criminal street gang conviction (although the court stayed the additional term for the associated great bodily injury enhancement). The court also imposed a consecutive eight-month term on Austen for the attempted robbery conviction. The court stayed the terms or sentenced concurrently on all other convictions and enhancements. Thus, the court sentenced Austen to an aggregate term of nine years in prison, Pauliton to a term of nine years and four months (which included a year for a prior charge), and Bonge to a term of eight years and four months.

DISCUSSION

I

Qualification Of The Gang Expert

Defendants contend the trial court abused its discretion in qualifying Officer Fellows as a gang expert because "he lacked expertise in gangs." We disagree.

"[A] person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates. Whether a person qualifies as an expert in a particular case, however, depends upon the facts of the case and the witness's qualifications. [Citation.] The trial court is given considerable latitude in determining the

qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion i[s] shown.

[Citations.]' [Citation.] This court may find error only if the witness '*clearly lacks* qualification as an expert.'"

(*People v. Singh* (1995) 37 Cal.App.4th 1343, 1377.)

Under this deferential standard, we must reject defendants' challenge to Officer Fellows as a gang expert. It is true, as Austen points out, that Officer Fellows lacked the amount of experience in working with and investigating gangs that officers qualified as gang experts in other cases have had. For example, in *People v. Williams* (1997) 16 Cal.4th 153, one expert had been a gang investigator since 1973 and had investigated more than 100 gang homicides; another had worked with gangs for 10 years, specializing in them for four years and giving lectures on the subject; and the third was a member of the gang unit and had been involved with gangs for seven years. (*Id.* at pp. 177, 195.)

While Officer Fellows's experience was not as extensive as the experience of these other officers, he nonetheless had sufficient gang training and experience for the trial court to reasonably find that he was qualified to testify as an expert on the subject. He had 250 hours of formal training on gangs, as well as additional training with the gang investigator who had testified before the grand jury. Also, he had investigated at least 20 gang cases and assisted on others, had hundreds of contacts with gang members, including a debriefing with a

lieutenant of the Nuestra Familia, and had read gang reports and other literature on gangs.

Defendants complain that before this case Officer Fellows "had never . . . qualified or testified as an expert [on gangs] in a jury trial." That fact is irrelevant, however, because, in and of itself, the lack of previous qualification in court does not prove a lack of sufficient experience to qualify as an expert. Indeed, every expert has to qualify as an expert for the first time *some time*. In any event, Officer Fellows *had* qualified as a gang expert at three preliminary hearings.

Defendants also complain that Officer Fellows's training was not specific to the Broderick Boys gang, but they make no showing there is any significant distinction between the Broderick Boys and other Norteño gangs. Indeed, Officer Fellows testified that the Broderick Boys "are different from Norte[ño]s [only] in the sense that the Broderick Boys are a set of Norte[ño]s [that] function within the community of West Sacramento." Further, while Officer Fellows's formal classroom training may not have embraced the Broderick Boys in particular, he had significant practical experience with the Broderick Boys in his more than 700 gang contacts.

On this record, the trial court did not abuse its discretion in finding Officer Fellows qualified to testify as a gang expert.

II

Scope Of The Gang Expert's Testimony

Defendants contend Officer Fellows's testimony invaded the province of the jury because he testified to his opinion that defendants were active gang participants and that the crimes were gang related. They contend this testimony was tantamount to giving the opinion that defendants were guilty. They further contend they were denied effective assistance of counsel because defense counsel failed to object to this improper testimony.⁶

In *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658, the court held testimony of a gang expert on the subjective knowledge and intent of a specific, individual gang member was impermissible. In reaching this conclusion, the court surveyed case law that found expert opinion proper on certain aspects of gangs. The list of permissible gang topics included "the 'culture and habits' of criminal street gangs [citation], including testimony about the size, composition or existence of a gang [citations], gang turf or territory [citations], an individual defendant's membership in, or association with, a gang [citations], the primary activities of a specific gang [citations], motivation for a particular crime, generally retaliation or intimidation [citations], whether and how a crime

⁶ To the extent defendants also argue under this heading that Officer Fellows's opinion testimony was speculative and thus an improper basis for finding they were active participants in a criminal street gang, we address that argument hereafter as one going to the sufficiency of the evidence.

was committed to benefit or promote a gang [citations], rivalries between gangs [citation], gang-related tattoos, gang graffiti and hand signs [citations], and gang colors or attire [citations]." (*Id.* at pp. 656-657, fns. omitted.)

The testimony of Officer Fellows fell within these established parameters for proper testimony of a gang expert. In particular, Officer Fellows was entitled to testify about the gang membership of the various defendants, i.e., that they were active participants in a gang. (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1463-1464 [expert testimony was sufficient to prove gang membership].) Furthermore, because a violation of section 186.22, subdivision (a) requires more than active membership in a gang, Officer Fellows did not give an improper opinion on defendants' guilt simply by expressing an opinion on their active participation in a gang.

Because Officer Fellows's testimony about defendants' active participation in the gang was proper, we reject defendants' argument that their counsel were ineffective for failing to object to that testimony. "Defense counsel does not render ineffective assistance by declining to raise meritless objections." (*People v. Ochoa* (2011) 191 Cal.App.4th 664, 674, fn. 8.)

As for Officer Fellows's testimony that the assault on the train engineer was gang related, we find no reversible error or ineffective assistance of counsel with respect to that testimony either. In *People v. Ochoa* (2009) 179 Cal.App.4th 650, 664, the court stated that it was "impermissible" for the prosecutor to

ask the gang expert whether the crimes were committed to benefit the gang, rather than posing a hypothetical question to the expert. While Officer Fellows testified here that it was his opinion the assault was a gang crime, this opinion was elicited not by the prosecutor, but by defense counsel on cross-examination. More importantly, the jury's verdicts reveal that the jurors did not credit this aspect of Officer Fellows's testimony, as the jury found all of the criminal street gang enhancement allegations were not true. Under these circumstances, defendants cannot demonstrate prejudice from Officer Fellows's testimony, even if we were to conclude defense counsel fell below an objective standard of reasonableness in eliciting it. (See *People v. Boyette* (2002) 29 Cal.4th 381, 430 [setting forth standards for ineffective assistance of counsel claim].)

III

Sufficiency Of The Evidence: Criminal Street Gang Activity

Defendants contend there was insufficient evidence to support their convictions for criminal street gang activity (count 12). At least one defendant challenges the sufficiency of the evidence as to every element of the crime: that is, they contend there was insufficient evidence that the Broderick Boys qualified as a criminal street gang, that they were active participants in the gang, that they knew the gang engaged in a pattern of criminal conduct, and that they intended to promote or assist the gang in any felonious conduct. Additionally, defendants contend Officer Fellows's testimony was speculative

and thus an improper basis for finding they were active participants in a criminal street gang. We address, and reject, each of these contentions in turn.

A

Governing Law

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.

[Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder."

(*People v. Jones* (1990) 51 Cal.3d 294, 314.)

Subdivision (a) of section 186.22 provides as follows:

"Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a

county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years."

A "criminal street gang" is "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) The term "pattern of criminal activity" requires proof that gang members committed two or more predicate offenses. (§ 186.22, subd. (e).) The qualifying predicate offenses include assault with a deadly weapon or by means of force likely to produce great bodily injury. (§ 186.22, subd. (e)(1).)

B

Primary Activities Of The Gang And Pattern Of Criminal Activity

Defendants contend there was insufficient evidence the Broderick Boys qualified as a criminal street gang. Specifically, they contend that there was insufficient evidence that one of the primary activities of the Broderick Boys is the commission of statutory gang offenses or that its members engage or have engaged in a pattern of criminal activity.

"Sufficient proof of the gang's primary activities might consist of evidence that the group's members consistently and

repeatedly have committed criminal activity listed in the gang statute." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324, italics omitted.) Expert testimony on the subject may also be sufficient. (*Ibid.*)

Here, sufficient evidence of both the primary activities of the gang and its pattern of criminal activity was provided by expert testimony. Officer Fellows testified the primary activities of the Broderick Boys were assaults, thefts, burglary, narcotics and weapons violations, and homicide. Officer Fellows further testified to several serious assaults committed by members of the Broderick Boys gang. Two members of the Broderick Boys, Raymond Corona and Robert Montoya, brutally attacked a citizen in 2003, resulting in a conviction. Also, Officer Fellows personally investigated Caesar Lara Morales for conspiracy to commit assault with a deadly weapon arising out of a shooting in West Sacramento, which resulted in his conviction in 2007, along with a gang enhancement. Officer Fellows also knew that Jessie Garcia, another Broderick Boy, was convicted of assault with a deadly weapon likely to produce great bodily injury.

Defendants contend the foundation for Officer Fellows's testimony was insufficient because he personally knew of only the Morales case. It is well established, however, that a gang expert may base his opinions on personal observations and experience, the observations of other law enforcement officers, police reports, and conversations with gang members. (*People v. Gamez* (1991) 235 Cal.App.3d 957, 967.) Personal knowledge is

not required. Here, Officer Fellows testified that he based his opinion regarding the primary activities of the Broderick Boys on his "experience working in the City of West Sacramento, responding to calls of that nature, reviewing reports, and investigating them." That was sufficient.

C

Active Participation

Defendants contend there was insufficient evidence they were active participants in the Broderick Boys gang. According to Pauliton, "[o]ther than the expert's opinion, the prosecution's evidence [of active participation] was sparse and limited to a few photos of some defendants throwing gang signs, captured on a cell phone camera at the party, a red bandana in those pictures, an 'association' with one police-identified validated gang member a year before, which occurred during a suspected petty theft investigation, a red shirt found in a common area of [the Nunes] home, whose ownership was never established, and a writing seized from somewhere in the home, also without attribution."

Active participation in a criminal street gang requires involvement "that is more than nominal or passive." (*People v. Castenada* (2000) 23 Cal.4th 743, 747.) Active participation in a criminal street gang can be shown by contacts with members of the gang, bragging about gang association or membership, and assisting or promoting felonious conduct by the gang. (*Id.* at p. 753.)

Here, the evidence established that earlier on the day of the assault, defendants and others, including a validated Broderick Boys gang member, gathered at a motel in West Sacramento. While there, defendants posed for several photographs throwing gang signs: variations of "N," "14," and "XIV," which are symbols associated with the Norteño gang (of which the Broderick Boys is a subset), as well as the letter "B," which is a symbol associated specifically with the Broderick Boys. Pauliton displayed a red bandana, another Norteño symbol. Although it is possible to interpret these poses as "horsing around" and "mimick[ing] gang members," the jury was certainly under no obligation to draw that conclusion, particularly in light of Officer Fellows's testimony that "[i]f a gang member was to see somebody was throwing up the Norte[ño] or Broderick [Boys] gang sign knowing that individual was not part of that gang it would be their obligation and duty to attack and assault that individual."

"It is the province of the trier of fact to decide whether an inference should be drawn and the weight to be accorded the inference." (*People v. Massie* (2006) 142 Cal.App.4th 365, 374.) "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'" (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) Here, it was for the jury, not us, to decide what inference to draw from the photographs. Moreover, based on all of the evidence, it was

eminently reasonable for the jury to infer that by posing for photographs throwing gang signs in public view, defendants were proudly announcing and bragging about their gang affiliation and not just "horsing around."

Other evidence also supports the jury's finding that defendants were active participants in the Broderick Boys gang. They were in the presence of a validated gang member (Ernie S.) when they posed for photographs at the motel making gang signs. Bonge and Pauliton had been in the company of Rolando Venegas, another validated Broderick Boys gang member, during a shoplifting incident. Clothing and writing indicative of a gang affiliation was found at the Nunes residence. Austen had referred to "scraps," a derogatory term for Sureño gang members, while at juvenile hall and also had worn a red belt.

The jury could also rely on defendants' charged conduct to support the finding of active gang participation. (See *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331.) Significantly, the assault, one of the gang's primary activities, took place on the "turf" of the Broderick Boys, and defendants acted together in committing the crime, displaying a gang mentality. Further, they also acted in concert when stealing the beer, and Officer Fellows identified theft as another primary activity of the Broderick Boys.

Taken as a whole, and in the light most favorable to the jury's verdicts, the evidence was sufficient to prove that defendants were active participants in a criminal street gang.

Knowledge Of The Gang's Criminal Activity

Defendants contend there was insufficient evidence they knew the Broderick Boys engaged in a pattern of criminal gang activity. According to Austen, "[n]o evidence showed [he] knew about any other criminal activities of the gang or its members, other than the offenses on trial."

For purposes of section 186.22, subdivision (a), knowledge that members of a gang engage in or have engaged in a pattern of criminal gang activity requires only general knowledge of the gang's criminal purposes; it "does not require a defendant's subjective knowledge of particular crimes committed by gang members." (*People v. Carr* (2010) 190 Cal.App.4th 475, 488, fn. 13.) "[J]ust as a jury may rely on evidence about a defendant's personal conduct, as well as expert testimony about gang culture and habits, to make findings concerning a defendant's active participation in a gang or a pattern of gang activity, it may also rely on the same evidence to infer a defendant's knowledge of those activities." (*Id.* at p. 489, fn. omitted.) Here, defendants' association with known gang members, including Pauliton and Bonge's presence with Venegas at the Walgreens shoplifting incident, and defendants' conduct in stealing beer and assaulting the train engineer (and related crimes on the train tracks) shortly after their brazen display of gang association, coupled with the expert testimony about the culture and habits of the Broderick Boys gang, provided sufficient

evidence of the knowledge element of section 186.22, subdivision (a).

E

Willful Promotion, Furtherance, Or Assistance

In Felonious Conduct By Gang Members

Defendants contend there was insufficient evidence they intended to promote or assist the gang in any felonious conduct. Bonge contends there was no evidence, except his gang affiliation, that he "willfully intended to facilitate or promote felonious *gang-related* criminal conduct." (Italics added.) For his part, Austen contends the court committed instructional error by failing to instruct that the felonious conduct assisted must be gang related, and the jury's "not true" findings on the criminal street gang enhancement allegations under subdivision (b) of section 186.22 show that the jury found the felonious conduct was *not* gang related.

Defendants' contentions are answered by the recent case of *People v. Albillar* (2010) 51 Cal.4th 47. There, the California Supreme Court held there is no requirement under section 186.22, subdivision (a) that the felonious conduct that is promoted, furthered, or assisted be gang related. (*Albillar*, at pp. 51, 56.) Because defendants' arguments are based on a premise our Supreme Court has rejected, those arguments have no merit.

F

Speculative Expert Testimony

Defendants contend "[t]he expert opinion offered here was about the generalities of gang behavior and was without

substantive foundation in the facts of this case" and thus was "not a proper basis for a gang finding or conviction." Just which of Officer Fellows's opinions defendants intend to challenge by this argument is not clear, because they do not say. Nevertheless, we believe the discussion above adequately shows that to the extent defendants' convictions for the offense of criminal street gang activity were premised on Officer Fellows's opinions, those opinions were, in fact, rooted in the evidence of this case and not merely based on "the generalities of gang behavior." For this reason, defendants' argument is without merit. The evidence was sufficient to support their convictions for violating section 186.22, subdivision (a).

IV

Sufficiency Of The Evidence:

Great Bodily Injury Enhancement As To Austen

Austen contends there is insufficient evidence to support the great bodily injury enhancements as to counts 2 through 5, 8, and 12. Specifically, he contends there was no evidence he personally inflicted great bodily injury on Keating. Austen is mistaken, both as to the counts on which the jury found the great bodily injury enhancement true and as to whether there was evidence he personally inflicted such injury.

As to Austen, the jury found the great bodily injury enhancement allegations true only as to the charges of assault with the fire extinguisher (count 2), assault with the fire extinguisher on a public transit employee (count 5), battery

with serious bodily injury (count 8), and criminal street gang activity (count 12).

As for the evidence supporting those findings, Austen contends "no substantial evidence ever identified [him] as one of the participants in the group beating of Keating" and "[a]t most the evidence showed [he] personally threw a rock and personally demanded Keating's wallet and/or cell phone." (Italics omitted.) But Austen ignores evidence that he personally struck Keating twice with the fire extinguisher. In a statement to the police that was admitted into evidence, C. S. said Austen grabbed the fire extinguisher, came up behind Keating, and struck him twice in the head with it. C. S. testified similarly at trial. This evidence was sufficient to support the great bodily injury enhancement as to counts 2, 5, and 12. (We discuss count 8 separately hereafter.)

V

Failure To Instruct That C. S. Was An Accomplice

Austen and Pauliton contend the trial court erred in failing to instruct the jury that C. S. was an accomplice and thus her testimony required corroboration. Austen contends the error was prejudicial because only the testimony of C. S. established that he was part of the assault, as Keating identified Austen "only as to the attempted robbery." We find no error.

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the

offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.)

" "[W]henver the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice," the trial court must instruct the jury, sua sponte, to determine whether the witness was an accomplice. [Citation.] If the testimony establishes that the witness was an accomplice as a matter of law, the jury must be so instructed. [Citation.] In either case, the trial court also must instruct the jury, sua sponte, '(1) that the testimony of the accomplice witness is to be viewed with distrust [citations], and (2) that the defendant cannot be convicted on the basis of the accomplice's testimony unless it is corroborated" (*People v. Zapien* (1993) 4 Cal.4th 929, 982.)

Here, the court was not required to instruct on the law of accomplice testimony because there was no evidence C. S. was an accomplice. To be an accomplice, one must "act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.'" (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90-91.) In arguing C. S. was an accomplice, Austen and Pauliton do not cite any evidence that would have supported

a finding of the foregoing elements. Instead, they assert only in general terms, without reference to any evidence, that C. S. "could have been charged as a defendant under the prosecution's aiding and abetting theory" and that she "could have been another defendant." That is plainly not sufficient to carry their burden of demonstrating trial court error on the issue of accomplice testimony.

VI

Lesser Included Offenses

Defendants contend their convictions on the charges of assault with a deadly weapon (counts 2, 3 and 4) must be reversed because the offense of assault with a deadly weapon is a lesser included offense of assault with a deadly weapon on a public transit employee, and thus counts 2, 3, and 4 were lesser included offenses of counts 5, 6 and 7. The People concede this point.

Multiple convictions cannot be based on necessarily included offenses. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227.) "[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former." (*People v. Lopez* (1998) 19 Cal.4th 282, 288.)

The only distinction between assault with a deadly weapon (§ 245, subd. (a)) and assault with a deadly weapon on a public transit employee (§ 245.2) is the identity of the victim. Both crimes require an "assault with a deadly weapon or instrument" or "by any means likely to produce great bodily injury." (§§

245, subd. (a), 245.2.) Section 245.2 requires the victim of the assault be a public transit employee, as specified in the statute. Section 245, subdivision (a), on the other hand, applies to an assault simply "upon the person of another." Just as "assault with a deadly weapon upon a peace officer includes the lesser offenses of assault with a deadly weapon as well as simple assault" (*People v. Hood* (1969) 1 Cal.3d 444, 449), so too does assault with a deadly weapon on a public transit employee include assault with a deadly weapon.

Because counts 2, 3, and 4 are lesser included offenses of counts 5, 6, and 7, defendants' convictions on the latter offenses must be reversed.

VII

Great Bodily Injury Enhancement On Charge Of Battery With Serious Bodily Injury

Defendants contend the great bodily injury enhancement on the charge of battery with serious bodily injury (count 8) must be stricken because great bodily injury is an element of the offense. The People concede the point.

Section 243, subdivision (d) provides that when a battery is committed "and serious bodily injury is inflicted," the crime may be punished as either a misdemeanor or a felony. Subdivision (f)(4) of section 243 defines "[s]erious bodily injury" as "a serious impairment of physical condition." Section 12022.7, subdivision (a) provides a three-year enhancement for the infliction of "great bodily injury" during commission of a felony. For purposes of the enhancement,

"'great bodily injury' means a significant or substantial physical injury." (§ 12022.7, subd. (f).) This enhancement "shall not apply if infliction of great bodily injury is an element of the offense." (§ 12022.7, subd. (g).)

"The terms 'serious bodily injury' and 'great bodily injury' have substantially the same meaning" ⁷ (*People v. Hawkins* (1993) 15 Cal.App.4th 1373, 1375.) The *Hawkins* court concluded, "great bodily injury, as defined in section 12022.7, is an element of the crime of battery under section 243, subdivision (d)." (*Hawkins*, at p. 1376.) Because the enhancement is an element of the offense, the enhancement cannot be imposed. (§ 12022.7, subd. (g).)

We recognize that the court in *In re Jose H.* (2000) 77 Cal.App.4th 1090, 1096, affirmed a trial court's refusal to strike a great bodily injury enhancement in similar circumstances. We decline to follow *Jose H.*, however, because the court there did not consider subdivision (g) of section 12022.7, which clearly provides that the great bodily injury enhancement "*shall not apply* if infliction of great bodily injury is an element of the offense." (Italics added.) (Accord *People v. Hawkins* (2003) 108 Cal.App.4th 527, 531 [disagreeing with *Jose H.*].) Thus, the great bodily injury enhancement on

⁷ Thus, the trial court's ad hoc instruction to the jury here that great bodily injury is *not* the same as serious bodily injury was erroneous.

the charge of battery with serious bodily injury (count 8) must be stricken.

VIII

Section 654

Defendants contend section 654 bars separate punishment for the crime of criminal street gang activity and the underlying felonies used to prove the "felonious conduct" element of that offense because the underlying felonies for which defendants were already separately punished -- assault with a deadly weapon (the fire extinguisher) and vandalism -- were the acts that transformed their membership in a gang into the substantive gang activity offense. Based on our Supreme Court's recent decision in *People v. Mesa, supra*, 54 Cal.4th at page 191, we agree.

In pertinent part, subdivision (a) of section 654 provides that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Under subdivision (a) of section 186.22, it is a crime to actively participate in a criminal street gang with knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity, and to willfully promote, further, or assist in any felonious criminal conduct by members of the gang. Here, in instructing the jury on the "felonious criminal conduct" element of the crime, the trial court instructed that "[f]elonious criminal conduct means committing or attempting to

commit any of the following crimes: [¶] Attempted murder, assault with a deadly weapon, battery with serious bodily injury, throwing missiles at the vehicle of a common carrier, attempted robbery or vandalism." Thus it is clear the charge of criminal street gang activity was based -- at least as far as the "felonious criminal conduct" element of that crime is concerned -- on the other felonies with which defendants were charged arising from their attack on the train engineer and their vandalism of the train.

In *People v. Mesa*, *supra*, 54 Cal.4th at page 191, the California Supreme Court held that under circumstances such as these, section 654 bars the imposition of additional punishment for the crime of criminal street gang activity. (See *id.* at pp. 200-201.) In other words, section 654 precludes defendants from being punished for the crime of criminal street gang activity and for the underlying crimes they committed in attacking the train engineer and vandalizing the train. Accordingly, we will order their sentences for the gang crime be stayed.

IX

Court Security Fee

In 2008, the year of defendants' convictions, section 1465.8 required a court security fee of \$20 be imposed on every conviction for a criminal offense. (Stats. 2007, ch. 302, § 18.) The Legislature intended to impose the fee on all

convictions after the statute's operative date.⁸ (*People v. Alford* (2007) 42 Cal.4th 749, 754.)

The abstracts of judgment indicate a court security fee of \$280 for Austen, \$260 for Pauliton, and \$280 for Bonge. Bonge contends the amount of his fee is incorrect because he was convicted of only 12 counts, having been acquitted of attempted murder and attempted voluntary manslaughter (count 1) and attempted robbery (count 9). Since we reverse the three convictions for assault with a deadly weapon as to all defendants, the amount of the fee must be corrected for all defendants. The People properly concede a correction in the amount of the fee is appropriate.

The proper amount of the court security fee is \$220 for Austen (\$20 times 11 convictions), \$200 for Pauliton (\$20 times 10 convictions), and \$180 for Bonge (\$20 times 9 convictions). We order the abstracts of judgment amended accordingly.

DISPOSITION

The convictions for assault with a deadly weapon (counts 2, 3, and 4) and the great bodily injury enhancements on the conviction for battery with serious bodily injury (count 8) are reversed, and the sentences for criminal street gang activity (count 12) are stayed pursuant to section 654. The amount of the court security fee is corrected as follows: Austen Nunes,

⁸ Because of this legislative intent, subsequent amendments increasing the amount of the court security fee after the date of defendants' convictions do not apply.

\$220; Pauliton Nunes, \$200; and Daniel Bonge, \$180. In all other respects, the judgments are affirmed. The trial court is directed to prepare amended abstracts of judgment showing these changes and to forward certified copies to the Department of Corrections and Rehabilitation.

We concur: ROBIE, J.

NICHOLSON, Acting P. J.

DUARTE, J.